IN THE SUPREME COURT OF MISSOURI

BOISE CASCADE CORPORATION	)	
	)	
Appellant,	)	
	)	No. SC 83869
v.	)	
	)	
DIRECTOR OF REVENUE, STATE OF MISSOURI,	)	
	)	
	)	
Respondent.	)	

FROM THE ADMINISTRATIVE HEARING COMMISSION OF MISSOURI
HONORABLE SHARON M. BUSCH, COMMISSIONER

BRIEF OF APPELLANT BOISE CASCADE CORPORATION

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JURISDICTIONAL STATEMENT

This action involves the questions of (1) whether, for the purposes of Section 143.801,[1] Appellant, is a "taxpayer," (2) whether, under 12 CSR 10-2.045, Appellant timely filed claims for a refund, where Appellant was unconstitutionally denied its original right to elect to file consolidated Missouri corporate income tax returns and subsequently filed on a consolidated basis for all open years within the applicable statute of limitations, and (3) whether, if the procedural limitations of Section 143.801 and 12 CSR 10-2.045(15) prohibited Appellant from being entitled to refunds, the remedies afforded under those provisions are inadequate under federal Due Process standards.

Because resolution of the issues in this appeal requires this Court to construe Missouri's revenue laws, including, but not limited to, Sections 143.801, and 12 CSR 10-2.045 (15), jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, Section 3.

[1] All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

Appellant, Boise Cascade Corporation ("Boise Cascade") is a Delaware corporation headquartered in Boise, Idaho. *See Stipulation of Facts*, R. 424-435, ¶ 1. Boise Cascade is the parent of an affiliated group of corporations, (the "Boise Cascade Group"), which includes, among other subsidiaries, Boise Cascade Office Products Corporation ("BCOPC"), BCT, Inc. ("BCT"), and OAPI, Inc. ("OAPI"). *Id* at ¶ 3.

The Boise Cascade Group filed federal consolidated corporate income tax returns for each of the tax years at issue in this matter, 1995 through 1997 (the "years at issue"). *Id*. at ¶¶ 4, 26, 38. During the years at issue, however, the Boise Cascade Group could not originally file Missouri consolidated income tax returns because it did not qualify under Section 143.431.3(1) by the extended due dates of its original returns. *Id*. at ¶¶ 19, 30, 43. Section 143.431.3(1) formerly required an affiliated group to derive fifty percent or more of its income from Missouri sources in order to elect to file a consolidated return. Because the Boise Cascade Group derived less than fifty percent of its income from Missouri sources, the members of the group who were subject to Missouri income tax filed their original Missouri corporate income tax returns for the years at issue on a separate company basis. *Id*. at ¶¶ 4, 8, 12, 16 (1997); 26, 27, 28 (1996); 38, 39, 40 (1995).

On December 22, 1998, this Court, in *General Motors Corporation v. Director of Revenue*, 981 S.W.2d 561, 568 (Mo. banc 1998), held that "to the extent Missouri Statute 143.431.3(1) requires an affiliated group to derive at least fifty percent of its income from sources within Missouri in order to file a Missouri consolidated income tax return, it

violates the Commerce Clause of the United States Constitution, Article I, Section 8." This Court then severed the offending provision from the statute, and stated that the only condition for making the consolidated return election is that the taxpayer's affiliated group files a federal consolidated return. *Id*.

On October 4 and 5, 1999, as a result of the *General Motors* decision, Boise Cascade, which as parent company necessarily represented its subsidiaries for all purposes relating to consolidated filings under 12 CSR 10-2.095(32), filed amended Missouri corporate income tax returns, for the years at issue, on a consolidated basis. *Id.* at ¶¶ 20, 31, 44. Boise Cascade claimed refunds for the years 1997, 1996 and 1995 of $115,020, $92,136 and $69,870 respectively. *Id.* at ¶¶ 21, 32, 45. The companies that were included on the Boise Cascade Group's Missouri consolidated income tax returns are the same companies included on the Boise Cascade Group's federal consolidated corporate income tax returns for the years at issue. *Id.* at ¶¶ 4, 8, 12, 16 [1997]; 26, 27, 28 [1996]; 38, 39, 40 [1995].

On November 1, 1999 and December 6, 1999, Respondent Director of Revenue ("Director") issued Notices of Adjustment for each of the years at issue, denying Boise Cascade's refund claims in their entirety. *Id.* at ¶¶ 22, 33, 46. Boise Cascade timely protested the Director's denial of its refund claims. *Id.* at ¶¶ 23, 35, 48. On March 20, 2000, and July 12, 2000, the Director issued Final Decisions, holding that Boise Cascade was not entitled to any refund for the years at issue. *Id.* at ¶¶ 24, 36, 49

Boise Cascade timely filed Complaints with the Administrative Hearing Commission ("Commission") on April 18, 2000 and August 1, 2000. *Id.* at ¶¶ 25, 37, 50.

On August 9, 2000, the Commission consolidated all of the Boise Cascade Group cases. R. 412. On July 9, 2001, in its *Memorandum and Order*, the Commission held that Boise Cascade was limited to a pre-deprivation remedy for its unconstitutional taxation, and that Boise Cascade had failed to timely invoke that pre-deprivation remedy. R. 454. Accordingly, the Commissioner issued an order denying Boise Cascade's refund claims. R. 455. Boise Cascade then timely brought this appeal.

POINTS RELIED UPON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELANT'S CLAIMS FOR REFUND BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT APPELLANT HAD NO PRE-DEPRIVATION METHOD TO CHALLENGE ITS UNCONSTITUTIONAL TAXATION WITHOUT PENALTY, AND FEDERAL DUE PROCESS (UNITED STATES CONSTITUTION, AMENDMENT XIV, § 1), THEREFORE, REQUIRED THE COMMISSION TO PROVIDE A POST-DEPRIVATION REMEDY FOR APPELLANT'S UNCONSTITUTIONAL TAXATION.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31-36 (1990)

Section 143.751

Ward v. Love County, 253 U.S. 17, 24 (1920)

Broadwell v. Board of County Commissioner of Carter County, 253 U.S. 25 (1920)

General Motors Corporation v. Director of Revenue, Case Number 96-1882RI (Mo. Admin. Hr'g Comm'n 1998)

Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928)

Section 143.631

Section 143.431

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT MISSOURI HELD OUT A POST-DEPRIVATION REMEDY FOR UNCONSTITUTIONAL TAXATION, AND FEDERAL DUE PROCESS (UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1), THEREFORE, PROHIBITS MISSOURI FROM WITHDRAWING THAT REMEDY BY LIMITING APPELLANT TO A PRE-DEPRIVATION REMEDY.

Reich v. Collins, 513 U.S. 106, 108 (1994)

Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442, 444 (1998)

North Supply Co., 29 S.W.3d 378, 379-380 (Mo. banc 2000)

Community Federal Saving & Loan Assoc. v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc 1988)

General Motors Corp. v. Director of Revenue, , 981 S.W.2d at 561, 563 (Mo. banc 1998)

Hackman v. Director of Revenue, 771 S.W.2d 77, 81 (Mo. banc 1989)

Homestake Lead v. Director of Revenue, 759 S.W.2d 847, 849 (Mo. banc 1988)

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III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND PURSUANT TO 12 C.S.R. 10-2.045(15) BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, IN THAT 12 C.S.R. 10-2.045(15) APPLIES ONLY TO QUALIFIED CORPORATIONS AND BOISE CASCADE AND ITS AFFILIATES WERE NOT ORIGINALLY QUALIFIED TO FILE CONSOLIDATED RETURNS FOR THE YEARS AT ISSUE.

12 CSR 10-2.045(15)

Gibson v. Commissioner, 89 T.C. 1177, 1187 (1987)

Grynberg v. Commissioner, 83 T.C. 255, 261 (1984)

Bayley v. Commissioner, 35 T.C. 288, 298 (1960)

Pacific National Co. v. Welch, 304 U.S. 191 (1938).

Section 143.3413

26 CFR 1502-75(a)(1)

Section 143.961.2

Section 143.751.1

IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND PURSUANT TO SECTION 143.801, BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THE BOISE CASCADE GROUP TIMELY SOUGHT REFUNDS OF UNCONSTITUTIONALLY PAID TAXES UNDER SECTION 143.801, AND TIMELY FILED ITS AMENDED CONSOLIDATED CORPORATE INCOME TAX RETURNS THROUGH ITS PARENT CORPORATION AND STATUTORILY AUTHORIZED AGENT, BOISE CASCADE CORP.

12 CSR 10-2.045(32)

Harper v. Virginia Dept. Of Revenue, 509 U.S. 86, 90 (1993)

Hamacher v. Director, 779 S.W. 2d 565, 567 (Mo. 1989)

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)

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General Motors Corp. v. Director of Revenue, 981 S.W.2d at 561, 563 (Mo. banc 1998)

Mid-American Television Co. v. State Tax Comm'n, 652 S.W.2d 674, 680 (Mo. banc 1983)

Section 143.801

ARGUMENT

INTRODUCTION

A. Boise Cascade is Entitled To a Remedy for Unconstitutional Taxation.

In *General Motors Corp v. Director of Revenue*, 981 S.W.2d 561, 568 (Mo. banc 1998), this Court held that Section 143.431.3(1) violates the Commerce Clause of the United States Constitution because that statute unconstitutionally denied affiliated corporations like the Boise Cascade Group the right to elect to file consolidated Missouri corporate income tax returns. Thereafter, the Boise Cascade Group filed amended returns for all open years in order to elect to file on a consolidated basis and sought refunds for the taxes it had overpaid as a result of its members originally filing on a separate return basis. Nevertheless, the Commission ruled that the Boise Cascade Group was not entitled to refunds because it held that the Boise Cascade Group failed to timely invoke its pre-deprivation remedy (Missouri's protest provision).

The Commission's decision is contrary to Missouri and federal law because (1) in regard to the issue of timely election, the decision relies on an administrative rule that logically and legally could not have applied to Boise Cascade, and (2) even if the election rule applied, it would deny Boise Cascade's federal Due Process right to "meaningful backward-looking relief to rectify any unconstitutional deprivation." *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990); *North Supply Co. v. Director of Revenue*, 29 S.W.3d 378, 379 (Mo. banc 2000) (holding that

under the Due Process Clause, states must provide taxpayers with adequate post-deprivation remedies against illegal taxes).

B. Standard of Review.

In regard to each of the points discussed below, this Court will affirm the Commission's decision only if it is: "authorized by law and supported by competent and substantial evidence upon the whole record . . .." *See* Section 621.193. In correcting errors of law, this Court exercises its independent judgment and reviews *de novo* all the Commission's interpretations, applications or conclusions of law. *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994), citing *Sneary v. Director of Revenue*, 865 S.W.2d 342, 344 (Mo. banc 1993). Taxing statutes and regulations must be strictly construed in favor of the taxpayer. *St. Louis Country Club v. Admin. Hearing Comm'n*, 657 S.W.2d 614 (Mo. banc 1983).

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND, BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, IN THAT APPELLANT HAD NO PRE-DEPRIVATION METHOD TO CHALLENGE ITS UNCONSTITUTIONAL TAXATION WITHOUT PENALTY, AND FEDERAL DUE PROCESS (UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1), THEREFORE, REQUIRED THE

COMMISSION TO PROVIDE A POST-DEPRIVATION REMEDY FOR APPELLANT'S UNCONSTITUTIONAL TAXATION.

A. The Commission Held That Boise Cascade Was Limited To a Pre-Deprivation Remedy.

The United States Supreme Court has long held that under the Due Process Clause, (United States Constitution, Amendment XIV, Section 1), a state must provide taxpayers with adequate remedies against unconstitutional taxation. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 31-36 (1990) ("[O]ne forced to pay a discriminatorily high tax in violation of federal law is entitled, in addition to prospective relief, to a refund of the excess tax paid . . . .") (citing *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928).) *See also, e.g., Ward v. Love County*, 253 U.S. 17, 24 (1920) and *Broadwell v. Board of County Commissioner of Carter County*, 253 U.S. 25 (1920). In so holding, the Court has emphasized that states have wide latitude in fashioning methods to discharge this constitutional responsibility. *McKesson, 496* U.S. at 37. To that end, states may offer either (1) a pre-deprivation remedy, "[a]llowing taxpayers to litigate their tax liabilities prior to payment," (2) a post-deprivation remedy, "employ[ing] various financial sanctions . . .in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment," or (3) a combination of the two. *Id*.

In this case, the Commission held that Missouri offered only a pre-deprivation remedy. In denying Boise Cascade's claims for refund for taxes resulting from an

admittedly unconstitutional law, the Commission held that Boise Cascade and its affiliated corporations had not properly availed themselves of Missouri's pre-deprivation remedy for its unconstitutional taxation: "Therefore, the affiliated group . . . is limited to pre-deprivation relief, which it did not timely invoke." R. 454.

Specifically, the Commission held that under 12 CSR 10-2.045 (15), prior to any deprivation or payment of taxes, Boise Cascade and its affiliated corporations had to elect to file a then-illegal consolidated Missouri corporate income tax return and to pay their taxes and resulting penalties under protest. R. 452,454. The Commission further held that having failed originally to file illegally on a consolidated basis, Boise Cascade was not entitled to avail itself of Missouri's post-deprivation "claim for refund" remedy because, under Section 143.801, it was not a "taxpayer." R. 453-454. Accordingly, the Commission held that Boise Cascade's exclusive remedy had been to file illegal consolidated returns, and because Boise Cascade failed to take advantage of its sole pre-deprivation remedy, the Commission held that Boise Cascade was without any post-deprivation remedy. R. 454.

The issue, therefore, is whether the pre-deprivation remedy available to Boise Cascade, and to which the Commission held Boise Cascade was restricted, was sufficient to satisfy the minimum standards of federal Due Process. Boise Cascade respectfully maintains that it lacked a constitutionally adequate pre-deprivation remedy in this instance, and so contrary to the Commission's decision, Boise Cascade is entitled to a post-deprivation remedy as a matter of law.

B. Boise Cascade Lacked A Constitutionally Adequate Pre-deprivation Remedy To Challenge Its Unconstitutional Taxation Because Missouri's Protest Provisions Required Boise Cascade To Accept the Imposition of Financial Sanctions In Order To Avail Itself Of That Pre-deprivation Remedy.

According to the United States Supreme Court in *McKesson*, pre-deprivation remedies may satisfy federal Due Process requirements only if the taxpayer has the opportunity to protest the payment of a tax prior to paying the tax and without the imposition of financial sanctions. *McKesson*, 496 U.S. at 31, 38 n. 21 (where "tax is paid in order to avoid financial sanctions . . . the State has not provided a fair and meaningful pre-deprivation procedure."). While Section 143.631 allows taxpayers to pay their taxes under protest, Missouri does not provide an adequate, **penalty-free** pre-deprivation remedy under Boise Cascade's circumstances.

To the contrary, Missouri law imposes a five percent penalty for any deficiency in a tax payment. *See* Section 143.751 (1) ("If any part of a deficiency is due to negligence or intentional disregard of rules and regulations (but without intent to defraud) there shall be added to the tax an amount equal to five percent of the deficiency.") Moreover, the right to file a protest does not arise until after such a deficiency has already been found and penalties have already been assessed. *See* Section 143.631 (1) ("**after** the mailing of a notice of deficiency, the taxpayer may file with the director of revenue a written protest against the proposed assessment . . .."(emphasis added)).

Accordingly, Boise Cascade lacked any pre-deprivation remedy that would have allowed it to challenge Section 143.431.3(1) without facing the imposition of penalties. The *General Motors* case removes any doubt of this. General Motors filed consolidated Missouri corporate income tax returns even though it failed to meet the fifty percent threshold requirement which was, at the time, presumptively constitutional. The Director refused to accept the election and assessed a penalty against General Motors in the amount of almost $700,000 (excluding interest on the penalty) for having so filed. *See General Motors Corporation v. Director of Revenue*, Case Number 96-1882RI (Mo. Admin. Hr'g Comm'n 1998), Findings of Fact ¶¶ 21, 24.

As the Court held in *McKesson*, the imposition of penalties in this manner renders a pre-deprivation remedy inadequate, and requires a state to extend to affected taxpayers an adequate post-deprivation remedy:

> [I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31. No remedy that forces a taxpayer to run the risk of financial sanctions is adequate because "[w]hen a tax is paid in order to avoid financial sanction . . ., the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful pre-deprivation procedure." *Id.* at 38, n.21.

As the penalty assessed to General Motors makes abundantly clear, the pre-deprivation remedy available to taxpayers wishing to challenge the constitutionality of Section 143.431.3(1) subjected taxpayers to the risk of incurring penalties (almost $700,000 in the case of General Motors) as the result of Section 143.751. If, as the Commission held, Boise Cascade was limited to Missouri's "pre-deprivation relief," then Boise Cascade was denied an adequate remedy under *McKesson*.

In summary, even if the statutory provisions and regulations relied on by the Commission relegated Boise Cascade to Missouri's protest remedy, (which as discussed below in Sections III and IV, they do not), such a pre-deprivation remedy would be constitutionally inadequate because Boise Cascade would have been forced to undergo the risk of financial sanctions to utilize it. No remedy for unconstitutional taxation that required Boise Cascade to undergo such a risk could satisfy minimum federal due process requirements. As a matter of law, therefore, the Commission's decision restricting Boise Cascade to Missouri's protest procedure was erroneous. Under *McKesson*, Boise Cascade is entitled to a post-deprivation remedy, free from the risk of financial sanctions, as a matter of law.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT MISSOURI HELD OUT A POST-DEPRIVATION REMEDY FOR

UNCONSTITUTIONAL TAXATION, AND FEDERAL DUE PROCESS (UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1), THEREFORE, PROHIITS MISSOURI FROM WITHDRAWING THAT REMEDY BY LIMITING APPELLANT TO A PRE-DEPRIVATION REMEDY.

A. States May Not Hold Out A Post-deprivation Remedy And Then Withdraw That Remedy In Light Of A Pre-Deprivation Alternative.

As discussed above, the states' authority in devising and administering remedial schemes for unconstitutional taxation, while broad, is not without limits. *See also James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). As this Court has recognized, in addition to providing taxpayers a chance to contest their taxes without the threat of financial sanctions, the Due Process Clause requires the states to:

> provide taxpayers, with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' . . . to ensure that the opportunity to contest the tax is a meaningful one.

North Supply Co., 29 S.W.3d at 379-380. For that reason, a state may not hold out a post-deprivation remedy and then deny a taxpayer relief because the taxpayer could have chosen a pre-deprivation alternative. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444 (1998); *Reich*, 513 U.S. at 113; *North Supply Co*., 29 S.W.3d at 379-380. Accordingly, the Commission's holding below that Boise Cascade was limited to a

pre-deprivation remedy under Section 143.631.1 necessarily fails in light of the alternative post-deprivation remedy held out by Missouri under Section 143.801.1.

Even if Section 143.631.1 provided an adequate pre-deprivation remedy (which it does not), under the federal Due Process Clause, that remedy was not a "clear and certain" remedy. As discussed below, Missouri has clearly held out a separate post-deprivation remedy as available under Section 143.801.1. Even if Boise Cascade's pre-deprivation remedy were otherwise adequate, it would not be a "clear and certain" remedy because a reasonable taxpayer would believe that a taxpayer had a purely post-deprivation remedy available under Section 143.801.1. If that post-deprivation remedy were denied, the effect would be an unconstitutional bait-and-switch.

In *Reich*, the United States Supreme Court held that, under the Due Process Clause, a state may not offer "what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 513 U.S. 106, 108 (1994). The United States Supreme Court continued, explaining that a state cannot deny a taxpayer relief on the ground that the state offered a pre-deprivation remedy when "no reasonable taxpayer" would believe that, in view of the apparent applicability of a post-deprivation alternative, the pre-deprivation remedy was the exclusive safeguard against unlawful exactions. *Id*. at 113. As discussed below, that is exactly what happened here. Missouri held out what any reasonable taxpayer would believe was a post-deprivation remedy for unconstitutional taxation, and yet the Commission below held that it was not available to Boise Cascade.

B. Missouri Law and the Decisions of this Court Have Clearly Stated That A Purely Post-deprivation Remedy Exists For the Payment Of Unconstitutional Taxes.

Section 143.801.1, by its plain terms, holds out to taxpayers the expectation of a purely post-deprivation remedy for the payment of taxes paid under statutes later declared to be unconstitutional. ("A claim for credit or refund of an overpayment of any tax imposed by sections 143.011 to 143.996 shall be filed the taxpayer within three years from the time the return was filed . . .") *See also Community Federal Saving & Loan Assoc. v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988) ("payment of a tax which was wholly unauthorized by law was an 'overpayment.'").

In addition to the unequivocal language of Section 143.801.1, this Court has repeatedly advised taxpayers that Section 143.801.1 offers a purely post-deprivation remedy for taxes paid but later found to be unconstitutional or legally invalid by intervening court decisions. *See Hackman v. Director of Revenue*, 771 S.W.2d 77, 81 (Mo. banc 1989) (in adopting Section 143.801, "the State has consented to a refund of any overpayment, erroneous or illegal payment, which would include a tax declared unconstitutional . . ."); *Homestake Lead v. Director of Revenue*, 759 S.W.2d 847, 849 (Mo. banc 1988) (Section 143.801 provides the "means of correcting inadvertencies or responding to intervening [court] decisions . . .").

C. Even if Missouri's Pre-deprivation Remedy Were Adequate, the Commission Nonetheless Erred in Holding That Boise Cascade Was

Limited to Missouri's Pre-deprivation Remedy Because the Commission's Decision Unconstitutionally Withdrew the Post-deprivation Remedy That Missouri Had Consistently Held Out As Being Available.

The analysis in *Reich* is controlling here. Like the "remedial" statutes at issue in *Reich*, Missouri's revenue laws allow taxpayers like Boise Cascade to challenge the constitutionality of an income tax statute by either withholding the taxes the Director proposes to assess and filing a protest, which is what the taxpayer did in the *General Motors* case, or paying the disputed taxes and then filing a claim for a refund, which is what Boise Cascade did in this case. *See* Sections 143.631.1 and 143.801.1; *General Motors Corp.*, 981 S.W.2d at 563.

As in *Reich*, Boise Cascade had every reason to believe that it had a purely post-deprivation remedy. Boise Cascade had every reason to believe that it was entitled by law to challenge the validity of the fifty percent threshold requirement, as it did, by having each member of the Boise Cascade Group pay the taxes shown due on their original, separate company returns, and then filing amended returns claiming refunds for their overpayments under Section 143.801.1. The fact that Boise Cascade could have, instead, violated the law by ignoring the statute's presumptively constitutional fifty percent threshold requirement, filed its original returns on a consolidated basis, and then, after being audited by the Director, contested a proposed assessment and penalty is, from a constitutional perspective, entirely beside the point. The suggestion to the contrary in

the decision below cannot be reconciled with contemporary federal Due Process Clause jurisprudence.

Although the Commission did not rule on Boise Cascade's constitutional claims, *see* R. 454, the Commission did suggest that it was not reasonable for Boise Cascade to rely on the availability of the refund claim alternative in Section 143.801.1. R. 453. The Commission stated that Boise Cascade "should have foreseen the problem [*i.e.*, the unconstitutionality of the fifty percent threshold requirement] presented by the current situation" and withheld the contested taxes like the taxpayer in *General Motors* did. *Id.*

Yet, the Commission identifies no authority for the proposition that choosing between two, plainly non-exclusive remedies, *i.e.*, Sections 143.631.1 and 143.801.1, is not reasonable. Nor does it explain how, even if Boise Cascade had shared General Motors' foresight, the refund alternative that Boise Cascade chose would have seemed any less available, or why Boise Cascade was any less reasonable for choosing it. To the contrary, as discussed above, the United States Supreme Court has mandated in *Reich*, and this Court has acknowledged in *North Supply*, that when a state offers taxpayers a post-deprivation remedy, the federal Due Process Clause prevents the state from denying the taxpayer relief on the grounds that the taxpayer might have pursued a pre-deprivation alternative. *Newsweek, Inc.*, 522 U.S. at 444; *North Supply Co.*, 29 S.W.3d at 379-380.

In denying Boise Cascade relief, therefore, the Commission erred first in relegating Boise Cascade to constitutionally inadequate pre-deprivation relief. But, even if the pre-deprivation remedy offered by Missouri had been constitutionally adequate, it was not a "clear and certain" remedy. In holding that Boise Cascade had to rely on

Missouri's protest provisions despite the existence of a clear right to **post**-deprivation relief, the Commission engaged in precisely the kind of bait-and-switch prohibited in *Reich* and by this Court in *North Supply Co*.

The Commission itself suggested as much when it stated that "[w]e acknowledge that a court may find that due process considerations outweigh the procedural analysis on which we rest our decision." R. 454. Under the federal Due Process Clause, even if Missouri's pre-deprivation remedy were adequate, the Commission could not relegate Boise Cascade to a pre-deprivation remedy where any reasonable taxpayer would have believed that there was a post-deprivation remedy available. For these reasons, contrary to the decision of the Commission, Boise Cascade respectfully maintains that it is entitled to a post-deprivation refund.

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND PURSUANT TO 12 C.S.R. 10-2.045(15) BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, IN THAT 12 C.S.R. 10-2.045(15) APPLIES ONLY TO QUALIFIED CORPORATIONS AND BOISE CASCADE AND ITS AFFILIATES WERE NOT QUALIFIED TO FILE CONSOLIDATED RETURNS FOR THE YEARS AT ISSUE.

A. This Court Need Not Reach The Constitutional Issues Because The Regulation Relied On By The Commission To Deny Relief To Boise Cascade Does Not Apply To Boise Cascade.

The Commission stated that the basis for its decision against Boise Cascade is that Boise Cascade's request for relief was barred by 12 CSR 10-2.045 (15)'s time limitation for electing to file consolidated Missouri corporate income tax returns. R. 451-2. The Commission held that the Director's regulation requires taxpayers to make the consolidated return election on or before the due date for the parent's return, and that because the Boise Cascade Group's members originally filed separate company returns for the years in dispute, they did not meet this requirement. R. 452; 12 CSR 10-2.045(15). This Court need not decide the federal constitutional issues discussed above, because as discussed below, the Commission's reliance on 12 CSR 10-2.045(15) to deny

relief involved a clear misinterpretation of the regulation and stands in sharp conflict with relevant federal precedent. Under a proper reading of 12 CSR 10-2.045(15), Boise Cascade timely filed its consolidated returns, and is entitled to relief.

B. 12 CSR 10-2.045 (14)'s Election Requirement Applies By Its Explicit Terms Only To "Qualified" Corporations And By Necessity, An "Election" Can Only Be Made By Qualified Corporations.

The Commission overlooked the fact that, in order for the election requirement of 12 CSR 10-2.045 (15) to apply to a given affiliated group, the affiliated group must be "qualified" to make that election. In fact, 12 CSR 10-2.045(15) itself specifically conditions an affiliated group's **duty** to make an election on its **qualification** to file a consolidated return:

> If an affiliated group **qualified to file a Missouri consolidated return** wishes to elect to file a Missouri consolidated return, the election must be exercised by the filing of a Missouri consolidated return on or before the due date (including extensions of time) for the filing of a common parent's separate return."

12 CSR 10-2.045 (15) *(emphasis added)*. There is no dispute that Boise Cascade and its affiliated corporations were not "qualified to file" a Missouri consolidated corporate income tax return prior to this Court's decision in *General Motors*. They undisputedly failed to meet Missouri's 50% threshold requirement. R. 426, ¶19, 430, ¶30, 433, ¶43. Accordingly, this regulation, by its own language, did not apply to them at the time that

Boise Cascade filed on a separate return basis and, as such, the Commission cannot use this regulation as a barrier to providing relief to Boise Cascade.

Moreover, even if the language of 12 CSR 10-2.045 (15) did not explicitly limit its timing requirements to qualified groups, as a matter of logic, no affiliated group could make an "election" to file on a consolidated basis if the affiliated group were not qualified to make the election. An election is defined as: "the exercise of a choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights of remedies." *Black's Law Dictionary*, 536 (7th ed. 1999). Therefore, because Boise Cascade and its affiliated corporations did not have a choice to make, they could not make an "election" to file separately but rather were **obligated** by law to file separately.

In summary, the Commission's decision is based on the factually, logically, and legally false premise that 12 CSR 10-2.045 (15) applied to Boise Cascade when it filed its original returns for the years at issue. At the time Boise Cascade and its affiliated subsidiaries filed their original, separate company returns, the law required a consolidated group to have at least fifty percent of its income from Missouri sources before the affiliated group could elect to file consolidated Missouri corporate income tax returns. All concede that the Boise Cascade Group did not meet this requirement, and so Boise Cascade and its affiliated corporations were excluded from 12 CSR 10-2.045(15)'s time limit by the regulation's self-limitation to those "qualified to file a consolidated return." R. 426, ¶19, 430, ¶30, 433, ¶43; *see* Section 143.341.3(1). Moreover, as a matter of logic, Boise Cascade did not "elect," i.e., choose from several possibilities, to file

separate company returns for the years at issue. It was obligated to file a separate return as a matter of law. Accordingly, the 10 CSR 10-2.045(15) election requirement could not have applied to Boise Cascade for the years at issue.

C. The Commission's Interpretation Of 12 CSR 10-2.045 (15) Is Not Consistent With Federal Precedent Which Limits "Elections" To Free Choices Between Legitimate Alternatives.

The Commission held that its application of 12 CSR 10-2.045 was consistent with its federal counterpart, 26 CFR 1502-75(a)(1). R. 452. Accordingly, the Commission concluded that Boise Cascade should have expected the Missouri regulation to apply in light of Boise Cascade's presumed knowledge of the Missouri regulation's federal counterpart. *Id.* It is true that Missouri law requires that rules prescribed by the Director, including the consolidated return rules, should be interpreted through the use of federal precedents. Section 143.961.2. The Commission's decision, however, is inconsistent with federal precedent, which holds that an election can only be made in situations where the taxpayer has a real choice.

The "doctrine of election" in federal tax law has enjoyed widespread application since its adoption by the United States Supreme Court in *Pacific National Co. v. Welch*, 304 U.S. 191 (1938). *See e.g.,. Grynberg v. Commissioner,* 83 T.C. 255, 261 (1984). This doctrine holds that an election under the federal tax laws is valid only when the taxpayer has a free choice between two or more alternatives, and the taxpayer signals its choice to the tax authorities. *Grynberg*, 83 T.C. at 261 ("there must be a free choice

between two or more alternatives"); *Gibson v. Commissioner*, 89 T.C. 1177, 1187 (1987) (no election originally where "no real opportunity to make a choice"); *Bayley v. Commissioner*, 35 T.C. 288, 298 (1960) (election implies choice between alternatives).

A choice between following the law and incurring penalties is no choice at all. Under federal law by definition, an election presupposes that the electing party is free from legal compulsions in making the choice. By contrast, Missouri would have imposed a penalty on Boise Cascade and its affiliated corporations if they had tried to elect to file on a consolidated basis when they were not qualified by law to do so. *See* Section 143.751.1. Accordingly, under Section 143.961.2, the Commission erred as a matter of law in applying 12 CSR 10-2.045 (15)'s temporal election requirement to Boise Cascade because its application does not comport with federal precedent. Boise Cascade and its affiliates lacked any free choice to make an election to file on a consolidated basis; therefore, it was an error to apply 12 CSR 10-2.045(15) to Boise Cascade.

In summary, the Commission's decision was based on the false premise that Boise Cascade and its affiliates had a free choice between filing separate company or consolidated returns by the extended dues dates of their original returns. They did not. Accordingly, 12 CSR 10-2.045 (15)'s election requirement did not apply to Boise Cascade, based on (1) the explicit language of 12 CSR 10-2.045(15) limiting its effect to qualified groups, and (2) logic and federal precedent which limits the definition of "elections" to include only situations in which taxpayers can make free choices. The Commission's decision, therefore, should be reversed, and Boise Cascade granted refunds for its overpayments for the years at issue.

IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANT'S CLAIMS FOR REFUND PURSUANT TO SECTION 143.801, BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW NOR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT BOISE CASCADE TIMELY SOUGHT A REFUND OF UNCONSTITUTIONALLY PAID TAXES UNDER SECTION 143.801 AND TIMELY FILED ITS AMENDED CONSOLIDATED CORPORATE INCOME TAX RETURNS THROUGH ITS PARENT CORPORATION AND STATUTORILY AUTHORIZED AGENT, BOISE CASCADE CORP.

A. This Court Need Not Reach the Constitutional Issues Discussed Above Because Boise Cascade is Entitled to Relief Under Section 143.801.

Section 143.801 provides:

> A claim for credit or refund of an overpayment of any tax imposed by sections 143.011 to 143.996 shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; or if no return was filed by the taxpayer, within two years from the time the tax was paid.

This statute provides Boise Cascade with a clear right to a refund for the years at issue. The Boise Cascade Group timely requested a refund under Section 143.801 by

filing amended consolidated returns through the agency of its parent corporation, Boise Cascade.

The Commission held that Boise Cascade did not qualify for a refund under Section 143.801 because neither Boise Cascade nor the Boise Cascade Group was the "taxpayer" that paid the tax for which a refund is sought: "the plain terms of section 143.801 do not apply in this case . . . therefore, the affiliated group cannot claim a refund and is limited to pre-deprivation relief . . .." R. 454.

As discussed above, the Commission's holding limits Boise Cascade to a constitutionally inadequate pre-deprivation remedy. Accordingly, even if the Commission's reading of this statute were correct, Boise Cascade would still be entitled to some other post-deprivation remedy as a matter of law, i.e. a refund ordered by this Court. However, because the Commission's interpretation involves a central legal error, this Court need not reach the federal constitutional issue because Boise Cascade is entitled to relief under Section 143.801.

B. Boise Cascade Requested the Refunds In This Case As Statutory Agent For Itself and Its Affiliated Subsidiaries.

The Commission conceded that the Director's regulation 12 CSR 10-2.045 (32) provides that the common parent of an affiliated group is the agent of its subsidiary corporations "in all matters relating to Missouri tax liability for the Missouri consolidated return year." R. 453-4.

Because the parent corporation acts as the agent for each member of the affiliated group, the Commission necessarily erred in concluding that the parties who paid the tax, i.e. the members of Boise Cascade Group who were subject to Missouri income tax, were not represented fully by their parent company, Boise Cascade Corp., when it sought refunds under Section 143.801. The Commission concluded that Section 143.801 did not apply in this case "because neither the parent corporation nor the affiliated group was the 'taxpayer' who paid the taxes." R. 454. This is simply not true. Under 12 CSR 10-2.045 (32), the parent corporation was the agent for and fully represented each member of the Boise Cascade Group which did pay the tax.

Moreover, as this Court has held, the very purpose of allowing corporations to file on a consolidated basis is to permit corporate affiliates to be treated as if they were one corporation. *General Motors Corp.*, 981 S.W.2d at 563, citing *Mid-American Television Co. v. State Tax Comm'n*, 652 S.W.2d 674, 680 (Mo. banc 1983). Because the parent corporation fully represents each of its subsidiaries, Boise Cascade and all its affiliated corporations were fully represented in seeking the refunds at issue in this case. It would defeat the very unitive purpose of consolidated filing to deny a remedy by attempting to separate the interests of the various corporations making the consolidated filing.

Given that Boise Cascade was the designated agent for all of its affiliates which joined it in filing consolidated returns for the years at issue, the issue is whether any corporation is entitled to relief on a consolidated basis, regardless of which corporation is the nominal party. The Boise Cascade Group should be treated as a single entity as a matter of law, regardless of what "business name" may appear at the top of the refund

claims in dispute. See *General Motors Corp.*, 981 S.W.2d at 563. Because of the agency relationship created by 12 CSR 10-2.045 (32) between Boise Cascade and its subsidiaries, the Commission clearly erred in finding that Boise Cascade was not a taxpayer under Section 143.801. Accordingly, the Commission's decision should be reversed and refunds awarded under Section 143.801.

C. Boise Cascade's Claim for a Refund under Section 143.801 for 1995 Was Not Barred By The Statute of Limitations.

In its decision, the Commission suggested, but did not hold, that the statute of limitations in Section 143.801 barred Boise Cascade's refund claim for 1995. R. 455. Section 143.801 does provide that a claim for a refund must be filed "within three years from the time the return was filed." The Commission's suggestion, however, overlooks the rule in Missouri for calculating the filing date of a return that has been filed early.

When a taxpayer files its return before an established due date, the return is considered to have been filed on the last day of the due date for purposes of Section 143.801's three-year statute of limitations. See *Hamacher v. Director*, 779 S.W. 2d 565, 567 (Mo. 1989). For the tax year 1995, Boise Cascade, and its affiliated corporations that were subject to Missouri income tax, filed their separate Missouri returns on October 3, 1996. R. 432. However, the returns were not due until the extended due date of October 15, 1996.

Under *Hamacher*, the due date is treated as the day of filing. Accordingly, Boise Cascade and its affiliated corporations are treated as having filed their original returns for

the 1995 tax year on October 15, 1996, not October 3rd, 1996. As the Commission observed, Boise Cascade filed its claim for a refund for 1995 on October 5, 1999, ten days before the three year statute of limitations would have lapsed on October 15, 1999. R. 455, 433. Accordingly, the Commission's suggestion is in error, and Boise Cascade is entitled to a remedy under Section 143.801 for each of the years at issue.

D. *General Motors* Must Be Applied Retroactively Rather Than Prospectively

In its effort to argue that Boise Cascade was not entitled to a remedy under Section 143.801, the Director contended below that, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the *General Motors* decision should be applied only on a prospectively basis. This argument, however, overlooked current United States Supreme Court decisions that clarify the constitutional requirements governing the prospective and retroactive application of decisions in situations where a state has violated a taxpayer's *federal* rights. Specifically, *Harper v. Virginia Dept. Of Revenue*, 509 U.S. 86, 90 (1993) has settled the issue by requiring retroactive application of state decisions based on the application of federal law. See also *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), which recognized that *Harper* overruled *Chevron Oil Co.* on which the Director relied. Accordingly, since this Court's decision in *General Motors* was based on federal constitutional grounds, Boise Cascade is entitled to a remedy under Section 143.801.

V. CONCLUSION

Appellant respectfully maintains that the Commission erred in holding that Boise Cascade was limited to a pre-deprivation remedy; the pre-deprivation remedy relied on by the Commission failed to meet the minimum requirements of federal Due Process because it would have subjected Boise Cascade to financial sanctions. Because Missouri's pre-deprivation remedy was inadequate, federal Due Process standards require Missouri to afford Boise Cascade a post-deprivation remedy for the taxes that it overpaid under a statute that was subsequently found to violate the United States Constitution. Moreover, even if Boise Cascade's pre-deprivation remedy had been adequate, the federal Due Process Clause prevents Missouri from holding out a post-deprivation remedy (like the income tax refund claim procedure in Section 143.801).1 and then denying Boise Cascade relief on the ground that Boise Cascade could have chosen the pre-deprivation remedy provided by Section 143.631.1. *Reich*, 513 U.S. at 111-113; *North Supply Co.*, 29 S.W.3d at 379-380.

This Court need not reach these federal constitutional issues, however, because the Commission erred in determining that the election requirement of 12 CSR 10-2.045 (15) applied to Boise Cascade. Similarly, under the circumstances presented in this case, the Commission erred in holding that Boise Cascade was not a "taxpayer" under Section 143.801. Under a proper interpretation of these provisions, Boise Cascade respectfully maintains that it is clearly entitled to refunds under Section 143.801 for the years at issue.

For all of the reasons discussed above, the Commissions decision should be reversed, and Boise Cascade's refund claims should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies on paper and disk of the foregoing were mailed first class, postage prepaid, this 15th day of October, 2001, to James R. Layton, State Solicitor, Supreme Court Building, 207 West High Street, P.O. Box 899, Jefferson City, Missouri 65102

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 8,367 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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